

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TAHIR YASEEN	:	DETERMINATION
	:	DTA NO. 817455
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period Ended	:	
April 1, 1998.	:	

Petitioner, Tahir Yaseen, 333 McDonald Avenue, Apartment 6-A, Brooklyn, New York 11216-2270, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended April 1, 1998.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 5 Penn Plaza, New York, New York on February 6, 2002 at 2:45 P.M. Petitioner appeared by Goldberg & Kaplan, LLP (Brian Kaplan, Esq.). The Division of Taxation appeared by Barbara G. Billet, Esq. (Mary Fontaine).

Since neither party herein elected to reserve time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the small claims hearing was held.

ISSUE

Whether petitioner was a person in possession of or had control of 118 cartons of unstamped or unlawfully stamped cigarettes and, as such, is liable for a penalty in the sum of \$10,800.00 imposed pursuant to Tax Law § 481(1)(b).

FINDINGS OF FACT

1. On April 7, 1998, the Division of Taxation ("Division"), by its Petroleum, Alcohol and Cigarette Tax Bureau, conducted a retail investigation/inspection of a business operated by Zahed Ali Bhatti d/b/a The Smoke Shop ("the store"). The store was located at 1364 Lexington Avenue, New York, New York and the only person present at the time of the inspection was

petitioner, Tahir Yaseen, a temporary employee working as a cashier behind the counter where cigarettes were sold.

2. During the course of its inspection of the store, the Division's investigators found 118.1 cartons of Virginia stamped cigarettes which they promptly seized. Petitioner was arrested and charged with two class E felonies pursuant to Tax Law § 1814.

3. On January 25, 1999, the Division issued a Notice of Determination to petitioner asserting that he was liable for a penalty in the sum of \$10,800.00. The penalty was imposed pursuant to Tax Law § 481(1)(b) at the rate of \$100.00 per carton for 108 cartons of unstamped or unlawfully stamped cigarettes. Although 118.1 cartons of Virginia stamped cigarettes were found, Tax Law § 481(1)(b) provides that the penalty of \$100.00 per carton be imposed for every carton in excess of ten cartons of unstamped or unlawfully stamped cigarettes. Petitioner filed a timely petition contesting the Notice of Determination and this proceeding ensued.

4. Petitioner immigrated to the United States in 1983 and soon thereafter he took employment as a gasoline attendant at a Mobil gas station located in Manhattan. In early 1998, after nearly 15 years of employment at the Mobil gas station, petitioner was temporarily laid off since the station had been closed and the new station to which he was being transferred was not yet ready to be opened. At the time that he was laid off petitioner expected to be out of work for only four to six weeks.

5. Soon after he was laid off, a friend of petitioner inquired if he would be interested in working at the store for a couple of weeks while the owner, Mr. Bhatti, returned to Pakistan for religious reasons. Petitioner, after discussing the offer with his wife and children, initially rejected the offer of temporary employment at the store; however, due to financial considerations, he subsequently decided to take the job. Petitioner is not related to Mr. Bhatti and he first met Mr. Bhatti when he went to work at the store in late February 1998. Petitioner worked with Mr. Bhatti for approximately one week to learn how to run the store before Mr.

Bhatti left for Pakistan. Petitioner worked at the store 7 days a week, 12 hours per day, for which he received a weekly salary of \$350.00.

6. In late March 1998 petitioner's supervisor from the Mobil gas station called him and asked him to return to work. Petitioner thereafter called Mr. Bhatti in Pakistan, and Mr. Bhatti inquired if it was possible for petitioner stay at the store for an additional two weeks until he returned to the United States. Petitioner stayed at the store as a favor to Mr. Bhatti after he had received assurances from his supervisor at the Mobil gas station that his job there was secure. Approximately one week later the Division conducted its investigation/inspection of the store, and after his arrest petitioner did not return to the store.

7. The 118.1 cartons of Virginia stamped cigarettes found at the store were located in three locations: behind the counter, in a rack above the counter for sale to the public and in ½ cases¹ located on pallets in the basement. The majority of the Virginia stamped cigarettes, between 90% and 95%, were located in the basement. Access to the basement, obtained via a hole in the floor which led to a small spiral staircase, was partially hidden behind a soda machine. There was no lighting in the basement.

8. Petitioner was not involved in the purchase of the cigarettes found in the basement, nor was he involved in transporting said cigarettes to the basement. The cigarettes located in the basement had already been placed there before petitioner started his employment at the store. Although petitioner was aware that there was a small basement located beneath the store, he had no reason to go into the basement until such time that a foul odor emanated therefrom. When the foul odor came from the basement petitioner borrowed a flashlight from a nearby business and he peered into the basement in an attempt to determine the nature of the odor. This was the extent of petitioner's access to the basement.

¹ A ½ case consists of 30 cartons of cigarettes.

9. Mr. Bhatti instructed petitioner that if it was necessary during his absence to purchase additional cigarettes, petitioner was to order certain brands from A.A. Shiva Wholesale and other brands from a different supplier. A.A. Shiva Wholesale was a licensed distributor, while the other supplier was not licensed. Petitioner, having never before been involved in the purchase and sale of cigarettes, was unaware that one of the suppliers was unlicensed and that it was improper for him to make purchases of cigarettes from this supplier. All information that petitioner had regarding this unlicensed distributor, specifically a pager number and a physical description, were readily given to the investigators or the assistant district attorney assigned to the criminal case.

10. The criminal charges brought against petitioner in Manhattan Criminal Court with respect to the 118.1 cartons of Virginia stamped cigarettes at issue herein were reduced to a single charge of disorderly conduct and petitioner was sentenced to a fine of \$250.00, with a \$45.00 surcharge.

CONCLUSIONS OF LAW

A. Tax Law § 481(1)(b) provides, in pertinent part, as follows:

the commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty.

B. In the instant matter, the evidence before me supports that petitioner was not a person in possession or control of the Virginia stamped cigarettes found in the basement. I reach this conclusion bearing in mind that petitioner held no ownership interest in the store, was not related to the owner and had been employed at the store for only five weeks in a temporary position when the inspection/investigation occurred. Furthermore, petitioner had not been involved in the purchase of said cigarettes and had not transported the cigarettes into the basement; nor did he take any cigarettes out of the basement and place them in the store for sale to the public. In fact, it appears that petitioner first became aware that cigarettes were located in the basement when

they were discovered by the Division's investigators. Petitioner at all times cooperated with the Division and assistant district attorney. Petitioner has offered credible testimony that he did not purchase the cigarettes found in the basement and in no way had control over them, and the record before me contains no compelling evidence or argument to show otherwise. Finally, it must be noted that all criminal charges were reduced to a single charge of disorderly conduct. Taking all of this into consideration leads me to the conclusion that petitioner was not a person in possession or control of the Virginia stamped cigarettes found in the basement.

C. I reach a different conclusion with respect to the Virginia stamped cigarettes found behind the counter and in the rack above the counter. Petitioner purchased these cigarettes and placed them in the store for sale to the general public, and he was therefore in a position to have possession and exert control over said cigarettes. Petitioner's ignorance of the law does not constitute a reasonable basis to find that he was not in possession or control of the Virginia stamped cigarettes found behind the counter and in the rack above the counter. Although the exact number of cartons of Virginia stamped cigarettes located behind the counter and in the rack above the counter is not known, the Division's investigator testified that 90% to 95% of the Virginia stamped cigarettes were located in the basement. For purposes of this determination, I find that 92½% of the Virginia stamped cigarettes were located in the basement, leaving 8.9 cartons (118.1 cartons x 7½%) located in the store and under the possession and control of petitioner. Since the statute allows for an individual to have in his or her possession and control up to 10 cartons of unstamped or illegally stamped cigarettes, no penalty under Tax Law § 481(1)(b) is due in the instant matter.

D. The petition of Tahir Yaseen is granted and the Division's Notice of Determination dated January 25, 1999 is hereby canceled in its entirety.

DATED: Troy, New York
April 18, 2002

/s/ James Hoefer
PRESIDING OFFICER